

NOTES

THE AMBIT OF THE DISCRETION OF COURTS IN THE CASE
OF ENCROACHMENTS: *FEDGROUP PARTICIPATION BOND
MANAGERS (PTY) LTD v TRUSTEE OF THE CAPITAL PROPERTY
TRUST COLLECTIVE INVESTMENT SCHEME IN PROPERTY*

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INTRODUCTION

The purpose of this note is to analyse a recent judgment of the South Gauteng High Court in *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee of the Capital Property Trust Collective Investment Scheme in Property* (unreported GSJ judgment, case no 41882/12, 10 December 2013). Although this is a fairly short judgment it raises important questions regarding the law pertaining to encroachments. As such, it warrants a discussion of the ambit of the courts' discretion where encroachments are concerned.

The facts of the case can be summarised as follows. The applicant and respondent owned neighbouring commercial properties. The applicant owned plot 989, which measures 5989 square metres, while the respondent owned plot 990, which measures roughly 1821 hectares. The applicant had initially owned both properties and sold off plot 990 to the respondent on 31 July 2006. At the time that the transfer took place, both parties were unaware that the existing fence between the two plots was not situated on the cadastral boundary between the properties (para 4). The inaccurate placing of the fence resulted in a triangular piece of land (measuring some 2271 square metres), an incomplete building (approximately 703 square metres in size) and a guard house structure being incorrectly incorporated as part of the applicant's land, although they actually belonged to the respondent (para 2). When the applicant became aware of the encroachment, it approached the respondent to acquire the encroachment area. The applicant offered to pay an amount of R4 410 721.00 plus a solatium of R100 000 for the encroachment to remain in place in perpetuity. However, the negotiations failed and the parties approached the Gauteng South High Court for a decision on the matter.

Victor J succinctly set out the three main issues to be decided in the first paragraph of the judgment:

‘The issues for determination is [sic] whether in the absence of a claim for demolition by an owner an encroacher can insist on transfer, alternatively a right in perpetuity in respect of the encroachment. A further issue is whether the applicant’s claim for the relief has prescribed and whether the disputes of fact justify the dismissal of the applicant[’s] claim.’

The first part of the judgment (paras 6–12) deals with whether the applicant (as the encroacher) can claim transfer of the encroached-upon land in the absence of a claim by the respondent (the affected landowner) for removal of the encroachment (para 6). Regarding the question whether an encroacher can insist on transfer of the encroached-upon land in the absence of a claim for demolition by an owner, Victor J held that ‘the applicant’s cause of action [based on a claim for transfer and compensation] is good in law and can be raised in the absence of a demolition order’ (para 12). However, the court cautioned immediately that each case will depend on its own facts, and it is these particular facts that would determine whether such an order would be appropriate (*ibid*).

In the second part of the judgment the court discussed the respondent’s defence based on prescription (paras 13–17). The respondent argued that the applicant knew that it was in the wrong more than three years prior to the application (para 4) and therefore the wrong was a debt which had prescribed in terms of s 11(d) of the Prescription Act 68 of 1969 (para 13). In contrast to this view, the court held that an encroachment cannot be frozen in a point in time: it is a continuing wrong being committed against another (paras 15–16). Consequently, because the respondent (as the affected landowner) always has the right to demand the removal of the encroachment, prescription was held not to be applicable in this context (paras 15 and 17).

In the end, the court held that it was unwilling to order transfer of the entire triangular encroachment in terms of its discretion (in other words, the whole area affected by the incorrect placing of the fence between the plots) (para 38). The court was only willing to order that the incomplete building structure be transferred to the applicant. It should be noted that the applicant was not willing to accept the transfer of the incomplete building by itself, and as a consequence the court dismissed the entire application (para 39).

Two aspects relating to the ambit of the court’s discretion are significant. The first is the court’s assumption that the discretion to deny the removal of the encroachment includes the power to order the transfer of the encroached-upon land. This decision seems to provide authority for the proposition that an encroacher can bring an independent cause of action claiming transfer of the encroachment area. This means that an encroacher would not have to wait for the affected owner to seek demolition first, but is in law permitted to approach a court directly, seeking transfer of his neighbour’s property against the payment of compensation. It is not clear that adequate authority exists for such a conclusion. In the next part of this note, some of the older South African cases will be revisited in order to analyse whether the decision provides an accurate reflection of the law.

The second issue worthy of investigation relates to the distinction between an illegal structure and an encroachment. If we are to assume that the

discretion that courts have in the context of encroachments includes the power to order transfer of the encroached-upon land — and that the encroacher is able to bring an independent cause of action seeking such transfer, as Victor J found — a related question may arise in some instances. Are we also to assume that the court has the power to exercise its discretion in this regard when the encroachment is also an illegal structure erected without the necessary building permission?

In this note these two issues will be investigated with reference to the judgment in *Fedgroup Participation Bond Managers*. My preliminary hypothesis is that the conclusions reached by Victor J were reached too easily and without an appropriately in-depth analysis.

THE CAUSE OF ACTION BASED ON TRANSFER OF THE ENCROACHED-UPON LAND

The decision in *Fedgroup Participation Bond Managers* creates the impression that an encroacher can bring an independent cause of action claiming the transfer of the portion of his neighbour's land which has been encroached upon. In addition, Victor J assumed that the discretion of the court in the context of encroachments includes the power to order a transfer of the encroachment area. Were these assumptions correct? It is necessary to discuss briefly the discretion that courts have in the context of encroachments. The aim of this discussion is to answer the question whether courts indeed do have the power to order the transfer of the encroached-upon land, and to assess whether that means that encroachers are entitled to seek transfer without an affected landowner first claiming the removal of the encroachment.

In South African law, the affected landowner usually demands that the encroaching structure be removed in the case where a building is partially erected on the land of another. Therefore, removal is ordinarily explained as being the default remedy in the case of encroachments (see C G van der Merwe *Sakereg* 2 ed (1989) 202; P J Badenhorst, J M Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* 5 ed (2006) 121; J R L Milton 'The law of neighbours in SA' 1969 *Acta Juridica* 223 at 237; C G van der Merwe & J B Cilliers 'The "year and a day rule" in South African law: Do our courts have a discretion to order damages instead of removal in the case of structural encroachments on neighbouring land?' (1994) 57 *THRHR* 587 at 588. See further *Pike v Hamilton* (1853–1856) 2 Searle 191 at 196, 198, 200; *Van Boom v Visser* (1904) 21 SC 360 at 361; *Stark v Broomberg* 1904 CTR 135 at 137).

It is clear from *Rand Waterraad v Bothma en 'n ander* 1997 (3) SA 120 (O) ('*Rand Waterraad*') and *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) ('*Brian Lackey Trust*') that courts have the discretion to award compensation instead of removal of encroaching structures. This was confirmed in *Phillips v South African National Parks Board* [2010] ZAECHGHC 27. Furthermore, in recent times courts dealing with encroachment disputes

have tended to prefer to use their discretion to award compensation rather than to order removal, more readily exercising this discretion in favour of the encroacher where policy considerations dictate such an outcome (for a discussion of the discretion of the court in this regard, see *Rand Waterraad* (supra); *Brian Lackey Trust* (supra); Milton op cit at 234; Van der Merwe & Cilliers op cit at 588; S Scott 'Recent developments in case law regarding neighbour law and its influence on the concept of ownership' (2005) 16 *Stellenbosch LR* 351; Anne Pope 'Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles' (2007) 124 *SALJ* 537; A J van der Walt 'Replacing property rules with liability rules: Encroachment by building' (2008) 125 *SALJ* 592; Z Temmers *Building Encroachments and Compulsory Transfer of Ownership* (unpublished LLD dissertation, Stellenbosch University, 2010) 50–7). It is also trite law that the discretion is wide and equitable and dependent on the circumstances in the specific case (see *Rand Waterraad* (supra) at 139). Furthermore, it seems as though courts would be more willing to order that the encroachment remains intact in instances where the continued existence of the encroachment results in an insignificant impact on the affected landowner's property rights (see Temmers op cit at 143–5). This would usually involve a case where there is an encroachment of a foundation of a wall or a really insignificant building encroachment that extends only a few inches into the property of a neighbour, without any perceptible effect on his use and enjoyment of the property. However, in the case of more significant encroachments, these types of encroachments usually result in a substantial limitation on the rights of the affected landowner. Therefore, the continued existence of the encroachment results in such an intrusion into the property rights of the affected landowner that simply cannot be justified on some instances (see *Phillips v South African National Parks Board* (supra) para 21 and Temmers op cit at 144). Consequently, it is more likely that courts will order demolition of the structure where it has a significant impact on the affected landowners' rights (however, see *Rand Waterraad* (supra) and *Brian Lackey Trust* (supra), which show that there are cases in which even large encroachments were left intact; but it must be pointed out that there were other factors indicating that demolition would not be the appropriate remedy in the circumstances). It was confirmed in *Brian Lackey Trust* that the discretion is not limited to minor encroachments but that it may even be exercised in the case of significant ones (*Brian Lackey Trust* (supra) para 29). Interestingly, the court in *Fedgroup Participation Bond Managers* was prepared to transfer the incomplete building which amounted to a significant encroachment, and accordingly the rationale appears to be similar to that of *Brian Lackey Trust* in so far as it indicates that courts are not loathe to allow large encroachments to remain in place.

Regarding the court's discretion in the case of encroachment, it was highlighted in *Meyer v Keiser* 1980 (3) SA 504 (D) that the discretion to substitute removal with compensation is one which is separate from the power to order the transfer of the encroached-upon land. In *Meyer v Keiser*

the plaintiff instituted action against the defendant for the removal of an encroachment. The plaintiff claimed that the defendant had built a house on the adjoining property without his knowledge, which encroached upon the property of the plaintiff to a substantial extent. The defendant in turn argued that it would be unjust and inequitable to order removal of the encroachment (see *Meyer v Keiser* (supra) at 505). Moreover, he asserted that the court should order the transfer of the plaintiff's land to him in exchange for compensation. It was contended on behalf of the defendant that the plea submitted by him 'disclosed a valid "defence" in the sense that the reparation tendered could be ordered' (ibid at 506). Although reliance was placed on *Christie v Haarhoff & others* (1886–1887) 4 HCG 349 for the assertion that an order for transfer may be made, the court in *Meyer v Keiser* pointed out that the basis of the judgment in *Christie v Haarhoff* was an award for damages in lieu of a removal order (see *Meyer v Keiser* (supra) at 506).

The decision in *Christie v Haarhoff* (supra) is typically cited — and was in fact so used in *Fedgroup Participation Bond Managers* — to substantiate the fact that a court has the discretion to order transfer of the encroached-upon land to the encroacher. However, it should be noted that the plaintiff in *Christie v Haarhoff* was in principle willing to accept compensation instead of removal, and the inevitable loss of property that would accompany the continued existence of the encroachment. Therefore, the court in *Christie v Haarhoff* (supra) at 354 (emphasis supplied) pointed out that

'[because the plaintiff] properly does not press his strict rights [to removal of the encroachment] to the extreme point; and it is *practically agreed* that the proper course will be for the plaintiff to transfer to the defendants the ground built upon, upon their paying all expenses of and incidental to the transfer, together with reasonable compensation for depriving him of the ground'.

Therefore, the plaintiff in *Christie v Haarhoff* was open to the transfer in exchange for compensation, and this was a significant factor in the framing of the court's order. Similarly, it can be argued in *Van Boom v Visser* (supra): another case relied upon by the defendant in *Meyer v Keiser* (supra) that the plaintiff also did not press his rights strictly, but was willing to accept 100 pounds to tolerate the encroachment in perpetuity and to accept transfer of the encroached-upon land. With reference to the question whether a court has the discretion to order transfer, Kumleben J in *Meyer v Keiser* (supra) at 507 remarked:

'When an award of damages is acknowledged as the permissible and appropriate form of relief in the case of an encroachment, an order for the transfer of that portion of the property encroached upon is incidental to, and consequent upon, such an award. The virtue of such an ancillary order is obvious but it need not necessarily be made (cf *De Villiers v Kalson* 1928 EDL 217 at 233), and in certain circumstances to do so may be impracticable or not permissible in law. The important point is that, whatever form the order takes in such a case, it is the award of damages which is the true basis for the relief granted. In my view, perhaps as a result of the form of the orders in the two decisions relied upon, this was overlooked by the pleader in the instant case which resulted in a misconception of the nature and extent of the Court's discretionary authority.'

On the basis of the discussion above, it is clear that the question of the ambit of the court's discretion in the context of encroachments has proven to be a particularly challenging aspect of this area of law. In this regard, I have highlighted how important it is to distinguish between the court's discretion to replace removal with compensation, on the one hand, and the power to order transfer of the encroached-upon land, on the other hand, because different levels of scrutiny are required in order to justify the limitation on the affected landowner's property rights in each respective case (See Z T Boggenpoel 'Compulsory transfer of ownership: A constitutional analysis' (2013) 76 *THRHR* 313). More specifically, I argue that whereas the discretion does exist with regard to the decision to replace removal with compensation, a similar discretion does not evidently exist with regard to the power to order transfer of the encroached-upon land.

In light of *Fedgroup Participation Bond Managers*, it can be argued that a further distinction needs to be drawn. In the earlier encroachment cases the question was specifically whether the court's discretion to replace removal with compensation included the power to order transfer of the encroached-upon land. In my view, *Fedgroup Participation Bond Managers* raises a different (but related) question considering the ambit of the court's discretion in the case of encroachments. The primary question that dominated the judgment in *Fedgroup Participation Bond Managers* was whether an encroacher can bring an independent cause of action claiming transfer of the encroached-upon land.

If this question is answered in the affirmative — which it was in this case — then we have to assume that the discretion of the court in encroachment cases includes the power to order transfer of the encroached upon land, because if the encroacher is permitted to bring a cause of action seeking transfer of the encroaching area against compensation, the court is only required to determine whether or not transfer should be ordered. However, these assumptions are problematic.

For a start, the encroachment cases that were used to come to this conclusion certainly do not provide the necessary authority to conclude that an encroaching landowner can claim — in terms of an independent cause of action — that his neighbour's land should be transferred to him in terms of the court's discretion in this context. At the most, the cases provide authority for the fact that the court does have a discretion to replace removal with compensation, and in some limited instances, transfer may be ordered, provided that both parties are amenable to the reallocation of these property rights.

The court in *Fedgroup Participation Bond Managers* stated that '[i]n *Christie v Haarhoff and Others* (1886–1887) 4 HCG 349 although there is an absence of reasoning the court granted transfer of the encroached area and ordered compensation' (para 9). However, it was clear in *Christie v Haarhoff* (supra) that the plaintiff (the affected landowner) instituted the cause of action on the basis of removal of the building erected by the defendants (ibid at 352). Therefore, the question whether an encroacher can bring a cause of action

on the basis of transfer of the encroached-upon land was not considered in *Christie v Haarhoff*. With regard to the end result — namely that transfer was ordered — it was mentioned earlier that the plaintiff in *Christie v Haarhoff* was willing to accept transfer in exchange for compensation. Therefore, it cannot be contended seriously that the court can arrogate to itself the power to order the transfer of the affected land against the will of the affected landowner. What is even less appropriate is to suggest that *Christie v Haarhoff* provides authority for the proposition that an encroacher can bring a claim for transfer of the affected landowner's property in the absence of a claim for demolition of the encroachment by the affected landowner.

The court in *Fedgroup Participation Bond Managers* also relied on *Brian Lackey Trust* (supra) and *Rand Waterraad* (supra) to reason that 'this court has a discretion to order transfer and compensation' and therefore that the 'applicant's cause of action is good in law and can be raised in the absence of a demolition order' (para 12 of the *Fedgroup* judgment). Once again, neither *Brian Lackey Trust* nor *Rand Waterraad* provides authority for the view that the court's discretion includes the power to order transfer of the encroached-upon land, or that the applicant (as the encroacher) can seek an independent claim for transfer of the respondent's land. What these decisions do illustrate is that the discretion does exist in the context of encroachments. Further, they also indicate in which specific circumstances a court is likely to exercise the discretion in favour of leaving the encroachment in place.

It is interesting to note that *Brian Lackey Trust* may have been relevant in so far as the plaintiff was the encroaching neighbour who sought an order 'declaring the defendant to be disentitled to the removal from erf 878 of the encroachment erected thereon by the plaintiff; subject to the payment of damages' (*Brian Lackey Trust* (supra) para 9). However, it should be stressed that the question in *Brian Lackey Trust* was whether removal of the structure should be ordered or whether the encroachment should remain in place in exchange for compensation (ibid para 1). Although, the court did mention that in the process of denying the defendant his right to removal of the encroachment, it may have resulted in the fact that the plaintiff would have 'effectively acquire[d] the defendant's land' (see *Fedgroup Participation Bond Managers* para 10; also *Brian Lackey Trust* (supra) para 16). However, it is doubtful whether this statement necessarily means that one would be able to assume that an encroacher can (in the light of *Brian Lackey Trust*) approach the court directly and seek transfer of the encroached-upon land. The sources therefore fail to substantiate the conclusions reached by Victor J in *Fedgroup Participation Bond Managers* about an encroacher being permitted to bring a cause of action seeking the transfer of the encroaching area in return for compensation.

AN ILLEGAL STRUCTURE OR AN ENCROACHMENT?

A second question that becomes relevant in the light of the *Fedgroup Participation Bond Managers* case is the ambit of the court's discretion when the

encroachment also happens to be an illegal structure in terms of the National Building Regulations and Building Standards Act 103 of 1977. The respondent had argued that ‘the structure is illegal and the local authority would in any event order the demolition of the incomplete building’ (see para 26).

Some interesting remarks were made by Koen J on this specific point in a judgment of the KwaZulu-Natal High Court in *Dyecomber (Pty) Ltd & another v East Coast Papers CC* [2013] ZAKZPHC 61, specifically with regard to the distinction between an illegal structure and an encroachment. The court stated that it did not have the discretion to decide whether or not a building structure which has no building plans, should be demolished (para 20). Therefore, in principle there is no discretion — as there is in terms of the common law rules regulating encroachment — to allow the encroachment to remain intact if the encroachment is also an illegal building (ibid).

It is worthwhile to mention briefly the facts that gave rise to this conclusion to draw an analogy with the *Fedgroup Participation Bond Managers* case. In *Dyecomber*, lot 1188 and lot 1189 were neighbouring properties. The second appellant occupied lot 1188 from 1998 and its managing director caused a second level to be added and a roof to be built on the existing building on its property. These extensions resulted in the structure, which protruded from lot 1188 onto lot 1189, causing an encroachment onto the respondent’s property. The first appellant then took transfer of lot 1188 (para 6). No plans were obtained for the erection of the second level that was added to the appellants’ home, or for the roof that was also built on lot 1188 (para 12). Consequently, the encroaching structures constituted an illegal structure in terms of s 4 of the National Building Regulations and Building Standards Act. According to s 4(1) of that Act:

‘No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.’

According to a fire safety officer of the eThekweni Municipality, ‘if plans for the building alterations in respect of the building on erf 1188, part of which constitutes the encroachment on erf 1189, had been submitted, they would not have been approved by the municipality’ (para 10). The fire safety officer also highlighted the violation of the building line restrictions — specifically in terms of the prescriptions applicable with regard to the allowable distance between buildings (paras 11 and 13). The court in *Dyecomber* (supra) relied on *Lester v Ndlambe Municipality & another* [2014] 1 All SA 402 (SCA), in which the SCA held that a court — in terms of s 4 of the National Building Regulations and Building Standards Act — does not have the discretion to decide whether or not a building structure, which has no building plans, should be demolished (para 20).

As a result of these precedents, it is clear that there is no discretion — as there is in terms of the common law regulating encroachment — to allow the encroachment to remain intact (para 20). The court in *Dyecomber* explained

that although the *Lester* decision could be distinguished from the facts in *Dyecomber*, s 21 of the National Building Regulations and Building Standards Act should in principle be applicable to municipalities and other personae (para 23). On this basis, the court held that the ratio decidendi of *Lester* is applicable to a municipality or to a neighbour.

The court in *Dyecomber* stated that where an encroachment also resulted in an illegal structure, the only legal remedy was the demolition of the encroachment (paras 18 and 19). The court also reiterated that it has no discretion to leave in place an illegal structure that happened to be an encroachment as well (para 22).

For purposes of the dialogue concerning *Fedgroup Participation Bond Managers*, it is important to take note of the court in *Dyecomber*'s distinction between neighbour law (encroachment) cases and public law (principle of legality) cases (see para 12 and 19 of the *Dyecomber* judgment). The court drew a clear distinction between cases where there are no approved plans for the building works (in other words illegal buildings as contemplated by the National Building Regulations and Building Standards Act) and the so-called 'normal' encroachment cases where the assumption is that there are building plans that were in principle approved, but for some reason an encroachment had nonetheless occurred. In the latter instances, courts generally have the discretion on the basis of fairness and equity to decide whether an encroaching structure should be removed or remain in place (against the payment of compensation) (see *Rand Waterraad* (supra) at 138; *Brian Lackey Trust* (supra); *Phillips v South African National Parks Board* (supra); *Roseveare v Katmer, Katmer v Roseveare* [2013] ZAGPJHC 18; see also Temmers op cit ch 3; Z T Boggenpoel 'The discretion of courts in encroachment disputes' (2012) 23 *Stellenbosch LR* 253). However, in instances where no approval was acquired, there is authority for the fact that it is not within the court's discretion to determine whether illegal building works should remain intact (see *Lester v Ndlambe Municipality* (supra)). As a result, the two instances are distinguishable because the extent of the courts' discretion in the respective cases differs.

The above-mentioned distinction may be relevant with regard to the partially-completed structure erected on the respondent's land without the necessary approval from local authority in *Fedgroup Participation Bond Managers* (see para 26). It is questionable whether the use of common-law remedies (specifically the removal of the encroaching structures, compensation, or even transfer, as indicated in *Fedgroup*) should be permitted when there is legislation (with very specific remedies) to regulate a specific point of law (see AJ van der Walt *Property and Constitution* (2012) 35. See also AJ van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77; Karl E Klare 'Legal subsidiarity & Constitutional rights: A reply to AJ van der Walt' (2008) 1 *Constitutional Court Review* 129 at 134). According to Van der Walt's subsidiarity principles, parties should not be free to rely on the common law to bring their cause of action when legislation has specifically been enacted to regulate the field (see Van der Walt 2008 *Constitutional Court Review* op cit at 100–3 and *Property and*

Constitution op cit at 35–9. This principle was established as a result of the Constitutional Court decisions of *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51–2 and *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437). The way in which the arguments in *Dyecomber* are structured illustrates clearly the application of the subsidiarity principles, and establishes an important precedent for cases where encroachments also happen to be illegal structures. *Fedgroup Participation Bond Managers* should really have been decided on the basis of remedies provided in the National Building Regulations and Building Standards Act, and not on common-law remedies available within the context of encroachment law. In this respect, then, it seems sensible that the question of the ambit of the discretion of the court should be limited to instances where the encroachment results despite approval of building plans. By contrast, it is probably advisable to decide illegal building cases in terms of the National Building Regulations and Building Standards Act.

CONCLUSION

In this short note, the outcome of *Fedgroup Participation Bond Managers* has been scrutinised with reference to two aspects. *Fedgroup Participation Bond Managers* seems to provide authority for the fact that the court's discretion in the context of building encroachments includes the power to order transfer of the encroaching structure, and also that an encroacher can bring an independent cause of action claiming transfer of the encroachment. Therefore, the decision is a novel one. However, it is questionable whether the court's assumptions can be substantiated with valid authority. As to the first, I have argued that the older South African cases do not provide adequate authority for such a conclusion and *Fedgroup Participation Bond Managers* failed to provide an accurate view of the law as far as the discretion of courts in the context of encroachments are concerned. None of the cases relied upon by the court provides authority for the fact that an encroacher can approach a court seeking transfer of the encroached-upon land.

With regard to the second assumption, it was necessary to determine whether an encroacher can ask a court to exercise its discretion in terms of the common-law rules regulating encroachment, when the encroachment is at the same time an illegal structure erected without the necessary building permission in terms of s 4 of the National Building Regulations and Building Standards Act. I concluded that in instances where no approval was acquired, there is authority for the fact that it is not within the court's discretion to determine whether illegal building works should remain intact. Therefore, a distinction needs to be drawn between cases where illegal structures occur and there are no approved plans for the building works (in terms of the National Building Regulations and Building Standards Act), and encroachment cases where there are approved building plans, but where the encroachment nonetheless occurred. This distinction is necessary, in my

view, to ensure that in instances where legislation does exist, private law remedies are not used to by-pass compliance with that legislation.

One can only hope that if this decision goes on appeal, the appeal court will provide greater clarity concerning these two aspects, which are not self-evident from the discussion in the court *a quo* or the conclusions that were drawn in the judgment. Clarity in this regard will go a long way in ensuring that Professor Milton's remarks that '[t]his portion of the law is in a very unsatisfactory state' (Milton *op cit* 234) will not remain as true now as they were when they were made 46 years ago.